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No. 91-540

In the Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS JAMES CHANCE, PETITIONER

v.

STATE OF SOUTH CAROLINA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a valid uncounseled misdemeanor conviction may be treated as a prior offense for purposes of sentencing a recidivist offender.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	4
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Argersinger v. *Hamlin*, 407 U.S. 25 (1972)	5
Baldasar v. *Illinois*, 446 U.S. 222 (1980)	2, 5, 6, 7, 13
Berry v. *State*, 561 N.E.2d 832 (Ind. Ct. App. 1990)	12
City of Pendleton v. *Standerfer*, 297 Or. 725, 688 P.2d 68 (1984)	10-11
Commonwealth v. *Thomas*, 510 Pa. 106, 507 A.2d 57 (1986)	11
Hlad v. *State*, 565 So. 2d 762 (Fla. Dist. Ct. App. 1990)	11
Kitchens v. *Smith*, 401 U.S. 847 (1971)	13
Lewis v. *United States*, 445 U.S. 55 (1980)	8
Lovell v. *State*, 283 Ark. 425, 678 S.W.2d 318 (1984)	10
Marks v. *United States*, 430 U.S. 188 (1977)	7
Moore v. *Georgia*, 484 U.S. 904 (1987)	4
Moore v. *Jarvis*, 885 F.2d 1565 (11th Cir. 1989)	10, 14
Moore v. *State*, 181 Ga. App. 548, 352 S.E.2d 821, cert. denied, 484 U.S. 904 (1987)	11, 13
Pananen v. *State*, 711 P.2d 528 (Alaska Ct. App. 1985)	10
People v. *Cooper*, 204 Ill. App. 3d 1035, 562 N.E.2d 1171 (1990)	14
Sargent v. *Commonwealth*, 360 S.E.2d 895 (Va. Ct. App. 1987)	11
Schindler v. *Clerk of Circuit Court*, 715 F.2d 341 (7th Cir. 1983)	8
Scott v. *Illinois*, 440 U.S. 367 (1979)	5, 8
Sheffield v. *City of Pass Christian*, 556 So. 2d 1052 (Miss. 1990)	11

Cases—Continued: Page

South Carolina v. *Smith*, 276 S.C. 494, 280 S.E.2d 200 (1981) 3
State v. *Armstrong*, 332 S.E.2d 837 (W. Va. 1985) 11
State v. *Cooper*, 343 N.W.2d 485 (Iowa 1984) 10
State v. *Dowd*, 478 A.2d 671 (Me. 1984) 10
State v. *Laurick*, 120 N.J. 1, 575 A.2d 1340 (1990) 11
State v. *Novak*, 107 Wis. 2d 31, 318 N.W.2d 364 (1982) 11, 14
State v. *Oehm*, 9 Kan. App. 2d 399, 680 P.2d 309 (1984) 10
State v. *Orr*, 375 N.W.2d 171 (N.D. 1985) 11
State v. *Ulibarri*, 96 N.M. 511, 632 P.2d 746 (1981) 10
State v. *Vares*, 71 Haw. 617, 801 P.2d 555 (1990) 10
United States v. *Brady*, 928 F.2d 844 (9th Cir. 1991) 10
United States v. *Eckford*, 910 F.2d 216 (5th Cir. 1990) 9
United States v. *Peagler*, 847 F.2d 756 (11th Cir. 1988) 9-10

Constitution, statutes and regulations:

U.S. Const. Amend. VI 14
Assimilative Crimes Act, 18 U.S.C. 13 9
8 U.S.C. 1325 9
15 U.S.C. 1264(a) 9
18 U.S.C. 3006A(a)(1)(a) 8
18 U.S.C. 3581(b)(7) 8
25 U.S.C. 202 9
S.C. Code Ann. § 56-5-2940 (Law. Co-op. 1991) 2
Sentencing Guidelines:
§ 4A1.1(c) 9
§ 4A1.2(c) 9
§ 4A1.2(d) 9
§ 4A1.2(e) 9
§ 4A1.2 9
Application Note 6 9
Background 9

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. On June 18, 1989, petitioner drove his car down an embankment and struck a utility pole. He was arrested and charged with driving under the influence of alcohol (DUI). Tr. 17, 19.[1] In March 1980, he had pleaded guilty to a similar offense in a South Carolina magistrates court; he was not represented

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[1] "Tr." refers to the Transcript of Record filed in the South Carolina Supreme Court.

by counsel at that time, nor was he incarcerated for that offense. Tr. 3, 11, 14; Pet. App. C.

South Carolina law, S.C. Code Ann. § 56-5-2940 (Law. Co-op. 1991), provides for enhanced punishment for a second DUI offense. A first offense is punishable by a fine of $200 or imprisonment for not less than 48 hours nor more than 30 days; the minimum term of imprisonment may be suspended, and 48 hours of community service imposed in its place. A second offense is punishable by a fine of not less than $2,000 nor more than $5,000 and imprisonment for not less than 48 hours nor more than one year; $1,000 of the minimum fine and the term of imprisonment may be suspended, and not less than ten days' community service imposed in lieu of imprisonment.

2. When petitioner appeared before the trial court on his second DUI offense, he did not contest his guilt. Instead, he argued that he should be considered a first offender because his first DUI conviction was uncounseled and so could not be used for sentencing enhancement under *Baldasar* v. *Illinois*, 446 U.S. 222 (1980). Tr. 2, 16-17. Petitioner has never claimed that he was indigent, and he does not assert any right under state or federal law to the appointment of counsel.[2] Nor does he claim that he was unaware when he pleaded guilty to his first offense that he had the right to retain counsel, or that he sought to exercise that right. His claim, here and in the courts below, is simply that he did not expressly waive representation by counsel and that, in the absence of any indication on the record that he was told that he could appear with counsel, his plea of guilty without the assistance of counsel

[2] Petitioner does not appear in forma pauperis in this Court, and the record does not indicate whether his counsel in the courts below was retained or appointed.

did not constitute an adequate implicit waiver. Tr. 12-14; Pet. S.C. Sup. Ct. Br. 3; Pet. 3.

The trial court ruled that the fact that petitioner had voluntarily appeared before the magistrate in his first DUI prosecution and entered a guilty plea without requesting counsel constituted a waiver of his right to counsel.[3] Tr. 15-16. As a consequence of that ruling, the trial court considered the instant DUI offense as a second offense for sentencing purposes without finding it necessary to rule on petitioner's *Baldasar* claim—*i.e.*, that an uncounseled misdemeanor conviction absent waiver of counsel cannot be used for sentencing enhancement.

Petitioner was sentenced to a $2,000 fine and one year's imprisonment, with $1,000 of the fine and all but two days of imprisonment suspended in favor of one year's probation. In addition, the court gave petitioner credit for the three days he had been jailed following his arrest. Tr. 19, 20. Thus, petitioner did not serve any term of imprisonment as a consequence of his DUI conviction. Petitioner has successfully completed his probationary period.

3. The Supreme Court of South Carolina affirmed petitioner's conviction and sentence. Pet. App. 1-4. It rejected petitioner's claim that *Baldasar* precluded consideration of his first DUI offense in the deter-

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[3] In South Carolina, a defendant need not appear at trial to be convicted of a first DUI offense. If he forfeits bond on such a charge, that will result in a conviction and an implied waiver of the right to counsel for purposes of using the uncounseled misdemeanor conviction to enhance the sentence for a subsequent offense. *South Carolina* v. *Smith*, 276 S.C. 494, 280 S.E.2d 200 (1981). The trial court reasoned that petitioner's voluntary appearance and plea of guilty likewise represented an implied waiver of the right to counsel. See Tr. 12-16.

mination of his sentence for the instant offense.[4] The court noted that this Court in *Baldasar* was evenly divided as to the effect of a prior valid uncounseled conviction on a subsequent offense under an enhanced penalty statute, with the deciding vote for reversal "cast on a different ground"—*i.e.*, the invalidity of the prior conviction. Pet. App. 2. The state court nevertheless observed that "a logical application" of this Court's decisions supports the conclusion that "an uncounselled conviction constitutionally valid under *Scott* [v. *Illinois*, 440 U.S. 367 (1979)] is valid for all purposes and therefore may be used to increase the term of imprisonment for a subsequent offense under an enhanced penalty statute." Pet. App. 3.[5]

DISCUSSION

The Supreme Court of South Carolina correctly concluded that *Baldasar* does not forbid the use of petitioner's uncounseled misdemeanor conviction to enhance the penalty for his subsequent offense. In dissenting from the denial of certiorari in *Moore* v. *Georgia*, 484 U.S. 904, 905 (1987), Justice White observed that "[p]ossibly because this Court was sharply divided in *Baldasar*, with no opinion for reversal gaining more than three votes, courts attempting to apply that decision have come to different con-

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[4] The court apparently accepted petitioner's position on the waiver issue, stating without amplification that "[petitioner] was not represented by counsel at the 1980 plea nor does the record before us indicate [petitioner] waived his right to counsel." Pet. App. 2.

[5] Justice Finney dissented. In his view, "a prior uncounselled conviction which did not result in incarceration may not be used to increase punishment under an enhanced penalty statute." Pet. App. 3.

clusions concerning its meaning." That observation remains correct. Nevertheless, this Court denied certiorari in *Moore*, where the issue was not cleanly presented. Although the confusion among the state courts regarding the use of uncounseled misdemeanor convictions to enhance penalties for subsequent offenses may merit resolution by this Court in an appropriate case, this case, like *Moore*, is not a suitable vehicle for that purpose. We accordingly suggest that certiorari should be denied.

1. In *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), this Court held that a State may not constitutionally imprison an indigent defendant for a petty offense unless he has been offered appointed counsel at his trial. In *Scott* v. *Illinois*, 440 U.S. 367 (1979), the Court refused to extend the holding in *Argersinger* to require an offer of counsel in all cases in which imprisonment is statutorily authorized. The Court explained (440 U.S. at 373):

> Even were the matter *res nova*, we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. *Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.

In *Baldasar* v. *Illinois*, *supra*, the question presented was whether a constitutionally valid, but uncounseled, misdemeanor conviction "may be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term."

446 U.S. at 222. Baldasar, who was indigent, had not been represented by a lawyer and did not formally waive counsel when he was convicted of his first offense of misdemeanor theft. Nonetheless, that first conviction was valid under *Scott* because Baldasar was not imprisoned for the offense. When that first offense was considered in determining the applicable punishment for Baldasar's second theft offense, the second offense was converted from a misdemeanor not requiring imprisonment to a felony carrying a sentence of one to three years' imprisonment. 446 U.S. at 223.

The per curiam opinion in *Baldasar* reversed the state court judgment affirming Baldasar's conviction and remanded for further proceedings; instead of providing a rationale for that result, the per curiam opinion referred to "the reasons stated in the concurring opinions." 446 U.S. at 224. Justice Stewart, joined by Justices Brennan and Stevens, concurred in the result for the reason that "the indigent prisoner, after his conviction of petit larceny, was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense." *Ibid.* Justice Marshall, with whom Justices Brennan and Stevens also joined, concurred in the result on the ground that "a conviction that is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." *Id.* at 228. Justice Blackmun concurred in the result, concluding that Baldasar's first conviction was invalid because he had been prosecuted for an offense punishable by more than six months' imprisonment. Justice Blackmun maintained the view (rejected by

the Court in *Scott*) that the potential punishment, not the actual sentence, determined whether Baldasar had the right to appointed counsel. Because Justice Blackmun considered Baldasar's first conviction constitutionally invalid, he reasoned that it could not be used to support enhancement. 446 U.S. at 230. In dissent, Justice Powell, joined by Chief Justice Burger and Justices White and Rehnquist, reasoned that Baldasar was being imprisoned for his second offense, not for his uncounseled first offense, and that a "*valid* misdemeanor conviction * * * should be available to enhance petitioner's sentence." *Id.* at 233.

The Supreme Court of South Carolina was correct in concluding that *Baldasar* failed to resolve the question presented in this case—whether a valid uncounseled misdemeanor conviction may be used under an enhanced penalty statute to impose greater penalties for a subsequent misdemeanor. In *Marks* v. *United States*, 430 U.S. 188, 193 (1977), this Court held that when no opinion in one of its decisions commands the support of a majority of the Justices, the holding of the Court is the position taken by the Justice or Justices who based their acquiescence in the decision on the narrowest grounds. In *Baldasar*, that rule refers us to the concurring opinion of Justice Blackmun, who based his agreement with the result on the reasoning that a constitutionally invalid prior conviction could not be used to enhance punishment for a subsequent offense. Justice Blackmun did not reach or decide the question whether a constitutionally valid uncounseled first conviction could be used for enhancement. Thus, the Court split 4-4 on that question and left it unresolved.

We agree with the reasoning expressed by Justice Powell for four members of the Court in *Baldasar*,

in which he concluded that a valid uncounseled misdemeanor conviction could properly be used to enhance the penalty for a subsequent offense. In such cases, the defendant is being punished by imprisonment for his second offense, not for his first offense. The theory of enhanced punishment is that commission of the second offense after a valid conviction for a first offense shows that the defendant has ignored the explicit warning provided by his first conviction that such conduct is prohibited. Although an uncounseled conviction is not a sufficiently accurate determination of guilt to permit the deprivation of liberty, it is sufficiently accurate to permit other kinds of punishment, such as a fine or enforced community service. See *Scott* v. *Illinois*, *supra*. *A fortiori*, such a conviction may serve as a valid warning that the defendant should avoid *future* unlawful conduct, and a State may legitimately impose enhanced penalties when the defendant ignores that warning. Cf. *Lewis* v. *United States*, 445 U.S. 55, 67 (1980) (use of constitutionally invalid uncounseled felony conviction is constitutionally sufficient basis for imposition of criminally enforceable firearms disability); *Schindler* v. *Clerk of Circuit Court*, 715 F.2d 341, 345-346 (7th Cir. 1983) (applying *Lewis* analysis to uphold a State's enhanced penalty scheme for drunk driving offenses against a *Baldasar*-based challenge).

2. In the federal system, an indigent defendant need not be offered appointed counsel when he is tried for an offense for which his potential imprisonment is not more than six months, as long as he is not actually sentenced to imprisonment upon conviction. See 18 U.S.C. 3006A(a)(1)(a), 3581(b)(7); *Scott* v. *Illinois*, *supra*. A number of federal statutes provide that a first offense is a misdemeanor that would not

require the appointment of counsel if there is no sentence of imprisonment, but a second or subsequent offense may result in enhanced imprisonment. See 8 U.S.C. 1325 (illegal entry into United States by an alien); 15 U.S.C. 1264(a) (shipment of misbranded or banned hazardous substances); 25 U.S.C. 202 (inducing an Indian to purport to convey title held by the United States in trust for him). Moreover, the enforcement in federal courts of state law under the Assimilative Crimes Act, 18 U.S.C. 13, has the potential for invoking state recidivist sentencing provisions. We have not discovered any reported federal decision under any of these statutes in which *Baldasar* has been held to prohibit the enhancement of a sentence based on a valid but uncounseled prior conviction. To be sure, in cases arising under the federal Sentencing Guidelines, courts have expressed some disagreement as to the scope of *Baldasar*. So far, however, that disagreement has not resulted in a square conflict among the circuits.[6] Accordingly, the

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[6] The Sentencing Guidelines require the inclusion of certain uncounseled misdemeanor convictions in the calculation of a defendant's criminal history. See Sentencing Guidelines §§ 4A1.1(c), 4A1.2(c), (d) and (e); *id.* § 4A1.2, Application Note 6 & Background. Such prior offenses could raise a defendant's criminal history score by up to four points, see § 4A1.1(c), and thus could increase his criminal history category by up to two levels, which in turn could result in an enhanced sentencing range. The Fifth Circuit has upheld the use of prior uncounseled misdemeanor convictions, valid under *Scott*, to increase the defendant's criminal history score where the resulting sentence was four months longer than the maximum sentence that would have been permissible if the misdemeanor convictions had not been counted. *United States* v. *Eckford*, 910 F.2d 216 (5th Cir. 1990). See also *United States* v. *Peagler*, 847 F.2d 756, 757-758 (11th Cir. 1988) (upholding use of valid uncounseled misdemeanor convictions

federal court decisions do not suggest that there is any pressing need at this time for this Court to revisit or clarify the scope of the *Baldasar* rule.

3. While the federal courts are not squarely in conflict over the scope of *Baldasar*, the state courts have reached sharply differing conclusions in attempting to apply *Baldasar* and the precedents on which it is based. Some state courts have read *Baldasar* broadly to prohibit the use of any prior uncounseled misdemeanor conviction to impose a term of imprisonment following a second conviction.[7] Others have read

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in sentencing for subsequent offense); *Moore* v. *Jarvis*, 885 F.2d 1565 (11th Cir. 1989) (no *Baldasar* claim can be made out where non-indigent defendant voluntarily pleaded *nolo contendere* or guilty to prior offense without retaining counsel). The Ninth Circuit, however, in *United States* v. *Brady*, 928 F.2d 844, 852-854 (9th Cir. 1991), held, as an alternative basis for its judgment, that it was impermissible to depart upward from a Guidelines sentence based on uncounseled misdemeandor tribal court convictions. The tribal court sentences involved in that case were invalid under *Scott* because they were fine-or-imprisonment sentences. Nonetheless, the court of appeals, in dictum, expressed agreement with Justice Marshall's position in *Baldasar* that any uncounseled misdemeanor conviction could not properly be used to increase a term of imprisonment imposed following a subsequent conviction.

[7] See, e.g., *Pananen* v. *State*, 711 P.2d 528, 531 (Alaska Ct. App. 1985); *Lovell* v. *State*, 283 Ark. 425, 428, 678 S.W.2d 318, 320 (1984); *State* v. *Vares*, 71 Haw. 617, 621, 801 P.2d 555, 557 (1990); *State* v. *Cooper*, 343 N.W.2d 485, 486 (Iowa 1984); *State* v. *Oehm*, 9 Kan. App. 2d 399, 401-403, 680 P.2d 309, 311-312 (1984); *State* v. *Dowd*, 478 A.2d 671, 678 (Me. 1984) (relying in part on state constitutional law); *State* v. *Ulibarri*, 96 N.M. 511, 512-513, 632 P.2d 746, 747 (1981); *City of Pendleton* v. *Standerfer*, 297 Or. 725, 729, 688 P.2d 68, 70 (1984); *Sargent* v. *Commonwealth*, 360 S.E.2d 895,

Baldasar more narrowly, to bar an enhanced penalty only if the enhanced term is greater than the term that could have been imposed for a first offense.[8] Still others have read *Baldasar* to be limited by Justice Blackmun's concurrence and therefore not to bar the enhancement use of prior convictions for misdemeanors for which the defendant was exposed to no more than a six-month term of imprisonment.[9] And one court has regarded *Baldasar* as not establishing *any* rule barring the enhancement use of valid, uncounseled convictions.[10]

4. In light of the disagreement among the state courts as to the permissible use of valid uncounseled misdemeanor convictions, we agree with petitioner that the issue is one that may well justify review by this Court in an appropriate case. We disagree, however, with petitioner's contention that this case is an appropriate vehicle for review by this Court. For several reasons, this case does not cleanly present the questions that have been left unresolved in the wake of *Baldasar*.

First, petitioner was not subjected to an enhanced term of imprisonment on account of his prior un-

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899-901 (Va. Ct. App. 1987); *State* v. *Armstrong*, 332 S.E.2d 837, 841 (W. Va. 1985).

[8] See *Moore* v. *State*, 181 Ga. App. 548, 549, 352 S.E.2d 821, 822, cert. denied, 484 U.S. 904 (1987); *State* v. *Laurick*, 120 N.J. 1, 16, 575 A.2d 1340, 1347 (1990).

[9] See, *e.g.*, *Hlad* v. *State*, 565 So. 2d 762, 764-766 (Fla. Dist. Ct. App. 1990); *State* v. *Orr*, 375 N.W.2d 171, 175-176 (N.D. 1985); *Commonwealth* v. *Thomas*, 510 Pa. 106, 112-114, 507 A.2d 57, 60-61 (1986); *State* v. *Novak*, 107 Wis. 2d 31, 35-40, 318 N.W.2d 364, 368-369 (1982).

[10] See *Sheffield* v. *City of Pass Christian*, 556 So. 2d 1052, 1053 (Miss. 1990).

counseled misdemeanor conviction. After his second conviction, he was given the statutory minimum sentence of 48 hours' imprisonment. That minimum term of imprisonment was the same as the minimum term to which petitioner would have been subjected if this had been his first DUI conviction. Moreover, the court at the time of sentencing treated petitioner's 48-hour sentence as fully satisfied as a result of the three days petitioner had already spent in pretrial detention. Thus, unlike the situation in *Baldasar*, petitioner did not suffer any imprisonment as a result of an enhancement based on his first, uncounseled conviction.[11] Accordingly, this case does not squarely present the question whether a term of imprisonment can be imposed because of a prior uncounseled conviction.[12]

This case differs from *Baldasar* in another important respect. The Illinois statutory scheme under which Baldasar was sentenced imposed mandatory imprisonment for the second offense but not for the

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[11] Also, in this case—in contrast to *Baldasar*—the second offense was not converted from a misdemeanor to a felony, subjecting petitioner to the collateral consequences of a felony conviction. Both a first and a second offense under the South Carolina penalty scheme are misdemeanors. See *Berry* v. *State*, 561 N.E.2d 832, 840 (Ind. Ct. App. 1990) (holding that valid uncounseled misdemeanor conviction could be considered in sentencing; distinguishing *Baldasar* on ground that in that case the offense level was enhanced).

[12] It is true that petitioner received a greater fine than he would have received for a first offense: a $1,000 fine was imposed, whereas a $200 fine was the maximum for a first offense. But *Argersinger* and *Scott* hold that the Constitution permits a fine to be imposed on an uncounseled defendant. It follows that the Constitution also permits the enhancement of a fine on the basis of an uncounseled first offense.

first. Thus, as Justice Stewart, joined by Justices Brennan and Stevens, characterized the situation, Baldasar was "sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution" (446 U.S. at 224). The South Carolina statutory scheme involved in this case permits the suspension of all imprisonment in lieu of community service for both a first and a second offense. The sentencing judge retains absolute discretion to determine whether the offender requires imprisonment as punishment for his second offense; the offender will not be imprisoned only and inevitably because of his prior uncounseled conviction.[13] Thus, even if the South Carolina statute is considered on its face, rather than as applied, the question left unresolved in *Baldasar* is not squarely presented here.

Finally, although *Argersinger*, *Scott*, and *Baldasar* all involved the right of an indigent defendant to appointed counsel, the record in this case does not indicate that petitioner has ever claimed to be indigent. Instead, his claim appears to be simply that, absent an express, on-the-record waiver of counsel in the prior case, his uncounseled conviction may not be used for enhancement of his penalty at the time of his subsequent conviction. That claim raises the issue—not presented in *Baldasar* or its precedents—of when a waiver of counsel is to be presumed from a record that is silent not only as to the issue of waiver, but also as to the antecedent issue of indigency. See *Kitchens* v. *Smith*, 401 U.S. 847, 848 (1971) (on col-

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[13] Cf. *Moore* v. *State*, 181 Ga. App. at 549, 352 S.E.2d at 822 (Georgia statute is not an enhanced penalty statute, because penalty to be imposed for both first and second offenses remains within the discretion of sentencing court), cert. denied, 484 U.S. 904 (1987).

lateral attack on a conviction for escape by asserting invalidity of original conviction, "to establish his right to appointed counsel [on original conviction] petitioner had the burden of proving his inability at that time to hire an attorney").

The courts below reached differing conclusions on the waiver issue. Applying South Carolina law, the trial court held that when petitioner pleaded guilty to his first offense without requesting the assistance of counsel, that constituted a waiver of his Sixth Amendment right to be represented by counsel. Tr. 15. The Supreme Court of South Carolina asserted that the *Baldasar* question was preserved when the record did not show that petitioner had affirmatively waived the right to counsel. Pet. App. 2a. Neither court, however, expressly addressed the relevance of the lack of any showing—or indeed any claim—that petitioner was indigent at the time of his first conviction.

This Court has never addressed the question whether waiver of the right to counsel may be implied by a voluntary guilty plea, where there is no claim that the defendant was prevented by the State, by his indigence, or by his ignorance from exercising his right to be represented by counsel. See *Moore* v. *Jarvis*, 885 F.2d 1565 (11th Cir. 1989) (no *Baldasar* claim can be asserted by a non-indigent defendant who pleaded *nolo contendere* and guilty to prior misdemeanors without counsel unless there is a showing that some state action prevented the defendant from retaining counsel); *People* v. *Cooper*, 204 Ill. App. 3d 1035, 562 N.E.2d 1171 (1990) (burden is on defendant to show indigency at time of first offense as predicate for *Baldasar* claim); *State* v. *Novak*, 107 Wis. 2d 31, 40 & n.5, 318 N.W.2d 364, 369 & n.5 (1982) (same). Because that preliminary issue remains unresolved in this case, as well as for the other

reasons we have discussed, we do not believe this case is a suitable vehicle for the Court to address the issue left unresolved in *Baldasar*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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